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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 127

J. H. HEMLER,

Petitioner,

versus

HOPE PRODUCING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

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May It Please the Court:

STATEMENT OF THE CASE.

Plaintiff, J. H. Hemler, instituted the present suit in the District Court for the Western District of Louisiana, seeking judgment against defendant for the sum of $12,-719.15, consisting of the following items, namely:

1/8th of 3.6c per 1000 cubic feet, in addition to the 3c already paid, on 1,695,542,-000 cubic feet, corrected to 2 lbs. above atmospheric pressure, as shown in paragraphs 4 and 5 of plaintiff's petition	$7,629.94
1/8th of 2c per 1000 cubic feet for gasoline extracted prior to sale, as shown in plaintiff's petition	4,626.56
Severance tax improperly deducted as recited in plaintiff's petition	462.65

Defendant appeared specially and first filed a motion to strike:

> (a) The allegations of plaintiff's petition dealing with the question of the demand for additional royalty on natural gas because the allegations of plaintiff's petition sought to recover the value of the gas, not at the well, but at points distant from the well, which allegations it was contended were inconsistent with the obligations of the defendant under the mineral lease, forming the basis of the action;
>
> (b) All allegations seeking to recover for royalty on the gasoline extracted from the natural gas produced from plaintiff's property; and,
>
> (c) All allegations dealing with the question of the right of plaintiff to recover for severance taxes, to the extent that such severance taxes were applicable to plaintiff's royalty interest in the gas. (R. 28-32).

Defendant likewise filed a plea in bar and plea of estoppel and acquiescence levelled at the proposition that plaintiff had, over a long period of time, accepted remittances for the gas produced by defendant, based on a market value of 3c per m. c. f., which remittances were tendered in full payment of all obligations of defendant to plaintiff, and that same were accepted and retained by plaintiff without protest. (R. 33-38).

Defendant likewise appeared specially and plead prescription (statute of limitations) of three years in bar of plaintiff's demands. (R. 38-39).

Defendant also filed a motion for a bill of particulars, seeking to have plaintiff set up the amount of gas for which he sought to recover in monthly quantities rather

than annual quantities, as set forth in plaintiff's petition. (R. 40-41).

In addition defendant filed an exception of no cause and no right of action.

When these motions were argued and submitted, judgment was rendered by the court, sustaining the motion to strike as to the demands for severance taxes and the value of gasoline, but referring the plea of estoppel and the plea of prescription to the merits. (R. 42-43). Order was entered in accordance with the rulings of the court. (R. 43-44).

Thereafter, upon reconsideration, the plea of prescription was reopened, (R. 44-45) and, upon conclusion of the trial, was sustained by the trial judge as to all of plaintiff's demand which matured more than three years prior to the institution of plaintiff's suit.

Plaintiff has taken no exception to the rulings of the court striking the demand with reference to severance tax and sustaining the plea of prescription; has assigned no error with reference thereto; and, therefore, has acquiesced in the action of the trial court in connection therewith.

Since plaintiff's suit was filed on August 5, 1935 (R. 21), all of his claim which accrued prior to August 1, 1932, is barred by the prescription of three years. Reference to the allegations of paragraph 4 of plaintiff's petition (R. 14) will show that by far the greater part of the gas produced by defendant from plaintiff's land was produced prior to August 1, 1932. Therefore, the amount in-

volved in the present suit, after eliminating the demand for severance tax and the additional amount demanded for gasoline royalties and applying the prescription of three years, will amount roughly to between $1,000.00 and $2,000.00.

Defendant answered admitting that it had drilled a well on plaintiff's land, from which it had produced gas; that for all gas which it had so produced, it had paid plaintiff a gas royalty equivalent to 1/8th of 3c per m. c. f., less plaintiff's proportionate part of the severance tax due thereon; that said price of 3c per m. c. f. represented the actual market value or market price at the well of all gas withdrawn by defendant from plaintiff's land; and that, therefore, defendant was in nowise indebted unto plaintiff. (R. 45-57).

Upon the issues, so made up, the case went to trial before a jury, which returned a verdict in favor of defendant in the following language, to-wit:

> "We, the jury find for ----- For the Defendant." (R. 382)

upon which, judgment was entered and, from said judgment, plaintiff prosecuted his appeal.

ARGUMENT.

The grounds upon which petitioner predicates his claim for a writ of certiorari are tersely set forth in paragraphs numbered 2, 3 and 4, appearing on pages 8 and 9 of the printed petition as filed with this Honorable Court. We shall deal with these contentions in the same order in which they have been asserted by petitioner.

I.

ANSWER TO PETITIONER'S ARGUMENT ON FIRST POINT.

The first ground upon which petitioner contends for the allowance of a writ of certiorari is set forth by him in the following language:

> "The decision of the Court of Appeals, denying to petitioner any royalty on the gasoline produced under the lease sued on, is in conflict with the decisions of the highest local court, the Supreme Court of Louisiana, as shown by the following decisions:
>
> "Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737;
>
> "Wall v. United Gas P. S. Co., 178 La., 908, 152 So. 561.
>
> "Said decision also seems contrary to equity and the contract, by permitting respondent to take gasoline from petitioner's land and pay petitioner nothing for it." (Petitioner's Application and Brief, page 8).

Petitioner is in error in asserting that the decision of the United States Circuit Court of Appeals is in conflict with the two decisions of the Supreme Court of the State of Louisiana in the cases cited by petitioner.

On the same day that the Circuit Court of Appeals handed down its opinion in the case of *Hemler v. Hope Producing Company, 117 Federal (2d) 231*, it likewise rendered an opinion in a companion case, *Union Producing Company v. Pardue, 117 Federal (2d) 225*, involving issues almost identical with those involved in the *Hemler v. Hope Producing Company* case.

In the opinion rendered in the *Pardue* case, the Circuit Court of Appeals dealt at length with the question of the right of a lessor, after he had been paid a full royalty on the gas, based upon its market value at the well, to likewise participate in the proceeds derived from the sale of natural gas gasoline extracted from this gas after the gas had been gathered and transported to a distant point and there processed for the purpose of extracting this gasoline.

In the opinion just referred to, the Circuit Court reviewed the two decisions of the Louisiana Supreme Court relied upon by petitioner in his application for a writ of certiorari, and pointed out the distinction between the issues involved in those two cases and the issues involved in the case then at bar.

That this Honorable Court may have before it the discussion of these cases and the reasoning of the Circuit Court of Appeals, we quote from the opinion of the Circuit Court in the *Pardue* case as follows *(117 F. (2d) 228-9)*:

> "Here cross appellant in support of his claim relies on the statutory definition of natural gas, ' "Gas" means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casinghead gas,' and on Coyle v. Louisiana, etc., Co., 175 La. 990, 144 So. 737, and Wall v. United Gas, Etc., Co., 178 La. 908, 152 So. 561. We might dispose of the cross action by a mere reference to our holding in the Arkansas Natural Gas Corp. v. Sartor, 5 Cir., 98 F. 2d 527, that the contract did not entitle plaintiffs to royalties based on the value of the gasoline extracted from the gas. But, in view of cross appellant's insistence that the matter is ruled otherwise in Louisiana, in the Coyle and Wall cases, we will point out that this is not so and why.

"The statute cross appellant invokes makes against, not for, his position. It expressly declares that the term gas means natural gas as it is taken from the earth including any gasoline content it may have, and leaves no question but that the sale of gas carries to the purchaser all, not part, of its content. Cf. The Coyle and Wall cases, supra, and Humble Oil & Refining Company v. Poe, Tex. Com. App., 29 S. W. 2d 1019; Lone Star Gas Co. v. Stine, Tex. Com. App., 41 S. W. 2d 48, 82 A. L. R. 1299; Wilkins v. Nelson, 155 La. 807, 99 So. 607. It is true that in the original opinion in the Coyle case (175 La. 990, 144 So. 739), the court said, 'We find nothing in the record to warrant the belief that the lease under review contemplated that defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises by merely paying him for one-eighth of the gas. If its gasoline content is not regarded as included in the gas within the meaning of the contract, then, obviously, defendant is not entitled to it, or any part of it. If it is so regarded, then one-eighth of it is due plaintiff by virtue of the agreement.'

"Aside from the fact however that no issue was made of this point in the case, it being conceded that under the lease contract plaintiff was entitled to 1/8 of the gasoline and the suit being only with regard to whether plaintiff could get this 1/8 of the gasoline without paying any part of the cost of its extraction, the conditions in the field involved and the terms of the lease were entirely different from those here. There, the gas was so rich in gasoline with one and a half to two gallons per 1,000 feet, that it was worthless unless the gasoline was first extracted. This was recognized by both parties, and the lessee from the beginning accounted to plaintiff for 1/8 of the gasoline. But more important, the lease there was not as here, one in which

the lessor sold the gas to lessee at the well. There was no provision in that lease for sale of the gas. There, the provision was that the lessee would 'pay the lessor one-eighth royalty for the gas from each well where gas only is found, while the same is being used off the premises.' Under such a provision, it was the duty of the lessee, absent an agreement for its purchase, to deliver to the lessor in kind, gas, gasoline, or whatever was made from the gas issuing from the well, or to account to him for his 1/8 of the proceeds of all sales. Here, the title to the gas passes to lessee at the well, lessee being obligated to pay lessor the value of it there. In the opinion on rehearing in the Coyle case, the true issue in the case was made clear. The court saying: 'The true issue * * * is whether plaintiff, as lessor, is entitled to be paid his proportionate part of the net sale price, or of the gross sale price, of the gasoline extracted from the gas, due him as royalty, produced from gas wells on the lease', held that as owner of the gasoline, lessor must pay his share of the expenses and must be settled with on the basis of the net sale price after expenses paid. In Wall's case, the lease provided as the lease here does, that the grantor should be paid 1/8 of the value of the gas calculated at the market price, but the conditions in the field as to the strong impregnation with gasoline were the same as those in the Coyle case, and as in that case, the lessee from the beginning had recognized the right of the lessor to an interest in the gasoline. There the lessor contended not for 1/8 but for all of the gasoline and when the case reached the Supreme Court, two main questions and one secondary one were raised, posed and decided there. First, as to what was the meaning of the terms 'market prices' as used in the lease, second whether the lessor under the lease providing for a 1/8 royalty interest 'is entitled to all the gasoline extracted from the gas or only 1/8 of it,' and

third, the question decided in the Coyle case, whether plaintiffs were entitled to the gross value of 1/8 of the gasoline, or its net value after costs of extraction had been paid.

"Plaintiff, in this case, having in his primary pleading alleged that lessee was entitled to and had bought all of the gas which came from the well and as a result of that purchase was liable to him for the full value of 1/8 of it, the district judge was right in holding that he could not add to the claim for that full value, another claim for two cents per 1,000 feet more, because the purchaser of the gas had extracted gasoline from it. Plaintiff's appeal presents no error. The judgment is affirmed as to both appeals."

Act 252 of the Louisiana Legislature for the year 1924, in section 13, defines natural gas in the following language:

"* * *; 'gas' means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas; * * *"

The lease which was executed by Mr. Hemler, under the terms of which Hope Producing Company produced natural gas, contains a royalty provision with respect to natural gas in the following language:

"To pay the lessor two hundred dollars each year for each well producing gas only, until such time as the gas shall be utilized or sold off the premises, and at that time the royalty above mentioned shall cease, and thereafter the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of market price cents per thousand cubic feet, corrected to two pounds above atmospheric pressure, and lessor to have gas free of cost from any such well for all stoves and all inside lights in

> the principal dwelling house on said land during the same time by making his own connections with the wells at his own risk and expense." (R. 23).

From this it will be seen that the natural gas royalty reserved by lessor, Hemler, in his lease, was not payable in kind, but was 1/8 of the value of the gas calculated at the market price. Under the settled jurisprudence of this state, the effect of this provision was to secure to the lessor the right to be paid for all natural gas produced from said well, including all of the elements thereof, one-eighth of the value of such gas at the wellhead.

Roberts v. United Carbon Company, 78 Fed. (2d) 39;
Arkansas Natural Gas Company v. Sartor, et al.; Sartor, et al., v. Arkansas Natural Gas Company, 78 Fed. (2d) 924;
Sartor v. United Gas Public Service Company, 84 Fed. (2d) 436;
Wall v. United Gas Public Service Company, 178 La. 908; 152 So. 561;
Sartor v. United Carbon Company, 183 La. 287; 163 So. 103;
Sartor v. United Gas Public Service Company, 186 La. 555; 173 So. 103.

Upon the trial of the case, the District Judge charged the jury in the following language:

> "If you find for plaintiff in answer to all of the preceding questions, then you should answer the following question:
>
> " 'We, the jury, find the market value of gas at the well in the Richland Parish gas field for the year 1932 to December 31st . . . cents per thousand cubic feet, for the year 1933 . . . cents per thousand cubic feet and for the year 1934 . . . cents per thousand cubic feet, all at a pressure of two pounds above atmospheric pressure of 14.4.' " (R. 379-380).

As stated above, the jury found for the defendant, which constituted a finding that 3c per m. c. f. represented the market value of gas at the well during the period involved in the law suit.

We believe that counsel for petitioner concedes that this is the only issue in the case, as in his brief, filed in the United States Circuit Court of Appeals, he says:

> "Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time.
>
> "In each of these cases, the same narrow issue is presented, namely, what is the market price of natural gas in the Richland gas field, in Richland Parish, State of Louisiana." (Petitioner's application and brief, page 37).

If plaintiff was paid one-eighth of the market value at the well-head for the gas produced from the well located on his property, including all of its elements (the jury found that he had been paid in full), then clearly plaintiff is not entitled to again be paid for one-eighth of the value of some one of these elements which was subsequently extracted from this gas at a distant point at a gasoline absorption plant. If so, he could just as successfully contend that he would likewise be entitled to one-eighth of the butane or methane which might be subsequently extracted from this gas, or one-eighth of any or all of the other elements of the gas that might subsequently be derived from it through some process of manufacture or extraction.

We submit that the statement of the Circuit Court of Appeals in the *Pardue* case, above quoted, to the effect

that plaintiff, after having been paid one-eighth of the full value of the gas as it was produced from the well, is without right to add to his claim for the full value another claim for a proportionate part of the gasoline which might be subsequently extracted from the same gas, for which plaintiff had been paid in full, correctly states the law of the case.

We, therefore, submit that the decision of the Circuit Court of Appeals is not only consistent with the jurisprudence of the State of Louisiana, but is the only decision which could be rendered consonant with law and equity.

II.

ANSWER TO PETITIONER'S ARGUMENT ON SECOND POINT.

The second ground upon which petitioner contends he is entitled to the allowance of a writ of certiorari is set forth by him in the following language:

> "The decision of the Court of Appeals, denying that the market price contemplated by the parties, and the market price to be used in this suit, is the market price in the field where produced, there being no sale at the well involved in this suit, is in conflict with the decision of the Supreme Court of Louisiana in the following cases:
>
> Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561;
>
> Sartor v. United Carbon Co., 183 La. 287, 163 So. 103." (Petitioner's application and brief, pages 8 and 9).

Petitioner is contending in this Court, as he contended in the District Court and Court of Appeals below,

that the decisions of the Louisiana Supreme Court in the opinions rendered in the cases of *Wall v. United Gas Public Service Company* and *Sartor v. United Carbon Company*, held that leases providing for a gas royalty of one-eighth of the market value thereof meant not market value at the well-head, but market value at some distant point to which the lessee might transport the gas and there sell it at some appreciated price which included compensation for the gathering and transportation thereof and other elements entering into such sale prices.

A reading of the two cases cited by petitioner will at once show that the petitioner's construction of these decisions is erroneous.

Should there, however, be any uncertainty as to the meaning of the Louisiana Supreme Court in the cases relied upon by petitioner, then we refer your Honors to a later decision of the Louisiana Supreme Court rendered in the case of *Sartor, et al., v. United Gas Public Service Company, 186 La. 555, 173 So. 103*, decided on February 1, 1937, wherein the Louisiana Supreme Court was again called upon to construe the meaning of a provision with reference to the royalty on natural gas which provided that:

> "'* * * grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of not less than three cents per thousand cubic feet, corrected to two pounds above atmospheric pressure.'"

The court interpreted this provision as it had in the prior decisions rendered by it and held *(186 La. 559, 173 So. 105)*:

> "Where there is no stipulation to the contrary in a lease contract of this kind, 'market value' is under-

stood to mean the current market price paid for gas at the well or in the field where it is produced. Wall v. United Gas Public Service Company, 178 La. 908, 152 So. 561; Sartor v. United Carbon Company, 183 La. 287, 163 So. 103, 104."

In discussing this conclusion, the court went on to say *(186 La. 562-7, 173 So. 106-7)*:

"It is argued on behalf of the plaintiffs that the prices received by the producers from the pipe-line companies should be accepted as the 'market value' of the gas in the field, as that term is used in the lease contract. The trial judge was not impressed with this argument. Neither are we.

"The testimony shows that there are two large gas fields in North Louisiana, one known as the 'Richland field' and the other as the 'Ouachita field.' The Richland field comprises an area within the parish of Richland, where the record shows that innumerable oil and gas leases have been granted by landowners. This field has been extensively developed and is, or was at one time, one of the greatest gas-producing areas in the South. Just how many gas-producing wells there are in this field is not shown. The Ouachita field is much larger in area, comprising parts of the parishes of Ouachita, Morehouse and Union. This field is also highly developed, there being therein literally hundreds of producing wells.

"These two fields, comprising parts of the four parishes, Richland, Ouachita, Morehouse, and Union, all grouped together in the extreme northern portion of this state, taken together embrace within their limits territory which is said to be one of the largest, if not the largest, natural gas-producing areas of the entire country. For several years there has been produced and is yet being produced in these fields vastly more natural gas than can be dis-

posed of and consumed in local markets, the result being that a market for the gas has been sought in regions far beyond the borders of this state. There is testimony in the record showing that gas from these fields is piped as far north as St. Louis and as far east as Atlanta. Millions of dollars have been spent in the construction of pipe lines to convey the gas to foreign markets. The corporations which built these pipe lines make contracts for the sale of gas to consumers in the territory adjacent to and at the ends of the lines, and in order to comply with their contracts, they in turn contract with producers to furnish the gas delivered into their pipe lines. The contracts between the producers and the pipe line companies run over periods of ten to fifteen years, the producers being obligated to furnish such amounts of gas as the pipe line companies may demand, usually within minimum and maximum limits.

"In order to supply the gas, the producers must maintain, at enormous expense, what are known as 'gathering systems,' which involve every expense from the purchasing of the leases to the laying of the lines to convey the gas from the wells to the pipe lines, the cost of meters to be installed at the pipe lines where the gas is delivered, the expense of their installation, the cost of keeping a clerical force to read the meters, calculate the amount of gas delivered, keep books, and make monthly reports to the purchasers.

"We have read all the contracts introduced and find that as relates to the obligations assumed by the producers, they are almost identical, about the only difference being as to the minimum and maximum amounts of gas to be delivered. In sum, here is what the producers obligated themselves to do:

"First, to deliver a specified 'annual minimum' amount of gas to the buyer and be prepared to de-

liver up to twice this amount upon the demand of the buyer. The annual minimum is subject to upward revisions as specified in the contract, the buyer being at all times entitled to demand a maximum amounting to twice the agreed minimum.

"Second, if deliveries for any reason fall below the amount agreed upon, the producer has a specified number of days in which to take steps to correct the deficiency and a specified number of days in which to resume delivery of the full amount. If the deficiency remains uncorrected after the specified number of days, the buyer is not obligated to take the full amount contracted for; and at the expiration of two years, the deficiency persisting, the buyer may cancel the contract.

"Third, to deliver all gas to two receiving stations, one in the Ouachita field and one in the Richland field. The producer or seller must provide, and maintain meters, pressure gauges, and other equipment for measuring and recording the amount of gas delivered, and must keep accounts and render monthly statements to the buyer.

"Fourth, seller must warrant title to all gas it delivers and must indemnify the buyer in case of judgments arising out of title or royalty litigation. It must pay production and severance taxes.

"By thus binding themselves under these contracts, the producers or vendors of the gas take all the risks and assume heavy burdens. They are required to make contracts extending over long periods of time, which involve the hazard or gamble that the wells and the territory then producing gas will continue to produce until the end of the term, which the testimony shows is always uncertain. If the wells for any reason cease to produce, and many wells do, according to the testimony, the producers must drill others. They are required by the pipe line companies, the purchasers, to deliver during

each year a minimum amount of gas, and at the option of the purchasers, double that amount. The producers have no way of knowing what amount of gas the purchasers will demand above the minimum stipulated in the contract, and for that reason it is necessary for them to stand ready at all times to deliver not only the minimum, but the maximum if called upon to do so.

"There is a wide range or margin between the minimum and the maximum amounts stated in the contracts. So that the producers, in order to be able during the life of the contracts to comply with their obligations to supply the maximum if the demand is made upon them, are compelled, in effect, to hold in reserve vast quantities of gas which may never be demanded. By that we mean that it is necessary for the producers to be prepared to deliver, not only the amount of gas which the purchasers are required under the contracts to take, but such additional amount up to the maximum as the purchasers may at their option demand. They must make preparations to deliver gas which may never be called for.

"The drastic 'stand-by' requirement in these contracts adds greatly to the expense of carrying them out. The testimony shows that the guaranty on the part of the producers to deliver, on demand, large quantities of gas above the minimum, formed part of the consideration for the prices paid by the pipe line companies.

"We have said that the pipe lines extended into the Richland field. By that we do not mean that they were laid up to or even near to each of the wells in the field. The so-called 'field' extends over a wide area with wells in every part of it. The pipe lines extend to a point in or near each of the fields where there are installed receiving or delivery stations. The purchasers pay for no gas except that which is delivered.

"These plaintiffs assumed no responsibility, guaranteed nothing, took no risks, and shared none of the expense of gathering and delivering the gas to the purchasers.

"Plaintiffs' theory that these pipe line prices should be accepted as the basis for settlement with them is unsound. Under their contract they are entitled to payment for their royalty interest in the gas based upon the 'market value' at the place where it is reduced to possession and ownership, where title vests, which is at the well, not at some distant point in the 'field' or elsewhere, to which it is transported for sale and delivery to the pipe lines. This was made clear in the case of Wall v. United Gas Public Service Company, supra.

"In the case of Sartor v. United Carbon Company, supra, plaintiffs contended that they should be paid according to the market value of the gas in the 'parish' and not the value at the well, and after citing the Wall case we said:

" 'The obvious reason why the market price at the well or field where the gas is obtained cannot be said to cover the market price in the parish where the gas is produced is because of the transportation charges which would necessarily augment the market price in the parish above the market price at the well or field. The clauses of the lease are clear from ambiguity and doubt and constitute the law between the parties.'

"The theory that royalty owners should receive settlements based upon pipe line prices has been rejected by the federal court in two recent cases.

"Arkansas Natural Gas Company v. Sartor (C. C. A.) 78 Fed. (2d) 924, 928; Sartor v. United Gas Public Service Co., (C. C. A.) 84 F. (2d) 436, 440."

It will thus be seen that both the Louisiana Supreme Court and United States Circuit Court have on several occasions held that, under a mineral lease containing a provision with respect to the payment of gas royalties, practically identical with the provisions of the lease in contest in the present suit, the lessor is only entitled to one-eighth of the market price or market value of the gas at the well from which it is produced and is not entitled to one-eighth of the amount that the lessee derives for said gas after gathering same and transporting it to some distant market.

It will be noted that the Louisiana Supreme Court, in its decision from which we have just quoted, interprets its decisions rendered in the *Wall* case and *Sartor* case, cited by the petitioner, in the same manner that they are interpreted by the United States Circuit Court of Appeals, and in a manner opposite to that in which they are interpreted by petitioner.

We respectfully submit that the foregoing clearly demonstrates that the decision of the United States Circuit Court of Appeals is not in conflict with the jurisprudence of the Supreme Court of the State of Louisiana, but is in accord therewith.

III.

ANSWER TO PETITIONER'S ARGUMENT ON THIRD POINT.

The third ground upon which petitioner contends he is entitled to the allowance of a writ of certiorari is set forth by him in the following language:

> "The Court of Appeals departed from the accepted and usual course of judicial proceedings, and denied

> to petitioner due process of law, by completely failing to consider or decide the issues laid before it by petitioner as appellant in that Court, as hereinabove recited.
>
> "The opinion of the Court of Appeals refers to its decision in the following cases decided the same day:
>
> "Union Producing Co. v. Pardue, 117 Fed. (2d) 225; Union Producing Co. v. Driskell, 117 Fed. (2d) 229;
>
> "Neither of these cases involved the same issue as in the case at bar and in neither of them were any of these issues discussed, except as to gasoline in the Pardue case." (Petitioner's application and brief, page 9).

Under this heading petitioner claims that the Circuit Court of Appeals failed to pass upon issues tendered to it, because it disposed of certain of those issues by referring to decisions rendered in two other cases decided on the same day. Petitioner, in his application for a writ in this Court, under his third point, states:

> "Neither of these cases involved the same issue as in the case at bar and in neither of them were any of these issues discussed, except as to gasoline in the Pardue case."

In connection with this contention, we state, with all due respect to counsel for petitioner, that he is misstating facts and is endeavoring to mislead this Honorable Court.

In substantiation of this assertion, we refer your Honors to the brief filed by counsel for petitioner in the Circuit Court of Appeals, a copy of which is attached to

petitioner's application in this court as an appendix. In said brief, counsel stated:

> "Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time.
>
> "In each of these cases, the same narrow issue is presented, namely, what is the market price of natural gas in the Richland gas field, in Richland Parish, State of Louisiana." (Petitioner's application and brief, page 37).

We believe this statement by counsel in his brief filed in the United States Circuit Court of Appeals is sufficient to demonstrate that the third ground upon which he bases his application for a writ of certiorari is not serious and can be dismissed without further consideration.

Conclusion.

We, therefore, respectfully submit that petitioner has not made out a case entitling him to a writ of certiorari and that his application should be denied.

Respectfully submitted,

HENRY P. DART, JR.,
ALDEN T. SHOTWELL.

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